(2)

NO. 95-1407

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF MARYLAND,

Petitioner

v.

TYRONE JEROME GADSON,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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15 pgs

QUESTION PRESENTED

Whether the Court of Appeals of Maryland correctly held that a prospective visitor to a prison has the right to leave the premises rather than submit to a detention for the purpose of being sniffed by a drug-detection canine where such a scan is conducted, without individualized suspicion, as a condition precedent to admission to the prison.

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TYRONE JEROME GADSON,

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Tyrone Jerome Gadson, by counsel, Stephen E. Harris, Public Defender of Maryland, and Julia Doyle Bernhardt, Assistant Public Defender, Office of the Public Defender for the State of Maryland, respectfully request that the Court deny the petition for writ of certiorari filed by the State of Maryland as there has been no showing that the question presented is one that merits consideration by this Court.

STATEMENT OF THE CASE

Trooper Charles Prince of the Maryland State Police testified that he worked with a K-9 dog named Sandy who had been trained to detect the odors of cocaine, heroin, marijuana, and hashish and was licensed as a certified drug-detection dog. (M. 3.)[1] Because of drug use by inmates in the Division of Correction, two of the state's prisons had been selected for intermittent screening of visitors by state police officers using drug detection canines. On September 13, 1992, Trooper Prince was working at one of these prisons, the House of Correction in Jessup. (M. 4-5.) On the road leading to the prison, vehicles were stopped at a guard shack. There, the drivers were informed that their vehicles would be scanned by the K-9 dog. Trooper Prince testified,

> When I scan the vehicles I mean just walk the dog on the outside of the vehicle.
>
> When we do this we have the person turn the vehicle off, take, usually take the keys out of the ignition, that prevents the people from trying to run us over. There have been times at the Correctional Institute where people tried to run us over when we were trying to perform these scans.
>
> This is a routine procedure. There are signs posted before you enter or half way through the, once you've entered the property off of 175 onto Correctional Facilities property, there's a sign stating that the vehicles are subject to search once they enter the property. And there are also signs before the guard house stating that drug detection dogs will be used.

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[1]Transcript references are to the motion to suppress hearing in the Circuit Court for Anne Arundel County held on May 21, 1993.

(M. 6.) He testified that the first sign is about 150 yards from Maryland Route 175. (M. 6.) There was also a sign at the booth where the vehicles were stopped. (M. 8.)

On September 13, 1992, a truck driven by respondent pulled up to the guard shack. Trooper Prince identified himself and said that he was going to perform a canine search of the vehicle. He told respondent to turn off his truck and respondent said that he would leave. Trooper Prince told him that the signs had advised that the search would be done and that since respondent was already on Division of Correction property, that the search would be done. (M. 8.) He prevented respondent from leaving and detained him there for purposes of the scan. (M. 8.) He testified that he did this because there were two vehicles behind respondent and because he was suspicious that there were narcotics in the truck. (M. 16.) Respondent turned off his truck and the dog scanned the truck; the dog alerted for the presence of a controlled dangerous substance. Trooper Prince told respondent that the dog had alerted and respondent said that he had a little marijuana in his gym bag. (M. 9.)

Respondent testified that he had gone to the House of Correction with his friend, Jeffrey Whitehead, to drop off money and food to an inmate. (M. 21.) He had never been there before and did not notice the signs. He thought that he was probably talking to his friend when he passed them. (M. 22.) He stopped at the shack and was asking an officer where to go to drop off the items when Trooper Prince approached and told him that his vehicle was subject to search. Respondent

put his vehicle in reverse and started to leave but Trooper Prince told him no and ordered him to turn off his truck. (M. 23.)

REASONS FOR DENYING THE WRIT

Seeking to bring this case within the ambit of *Michigan Department of State Police v. Sitz*, 496 U. S. 444, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990), petitioner repeatedly alludes in its petition for writ of certiorari to "the state's drug checkpoint policy" and to the "checkpoint guidelines" and refers to respondent as a "motorist" who approached such a "checkpoint."[2] *Petition* at 3, 4, 6. In *Sitz*, this Court upheld sobriety checkpoints on public roads, finding that the checkpoints furthered an important public interest (deterring and detecting drunken driving) and that the intrusion of a brief detention was no greater than necessary to achieve that goal.[3] Here, the comparison to a traffic checkpoint is deceptive. In fact, the "checkpoint" at the Maryland House of Correction has nothing to do with traffic safety and it is not contended by petitioner that such checkpoints could be established on public

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[2] It should be noted, however, that these so-called guidelines, if indeed they even exist in written form, were never placed in evidence in the circuit court in this case nor were any studies introduced showing the results of drug testing of inmates. Rather, the trooper testified generally that two of the state's prisons had been selected for intermittent detention and scanning of visitors by a state police dog and described how he conducted such operations. He testified that he did not allow respondent to leave rather than submit because he suspected that respondent had controlled dangerous substances in his car and because there were other cars behind his. The record clearly shows that respondent could have safely executed a U-turn and left the premises as a photograph which was placed in evidence shows a large clear area right in front of the guard house. (State's Exhibit No. 6.)

[3]The Court of Appeals of Maryland had earlier upheld such checkpoints in *Little v. State*, 300 Md. 485, 479 A. 2d 903 (1984).

roads to screen cars for the presence of controlled dangerous substances. The so-called "checkpoint" at the Maryland House of Correction is nothing more than a screening device for visitors. Thus, the real issue in this case is whether a prospective visitor who finds the conditions precedent to entry to a prison intrusive or otherwise objectionable can leave without submitting to them. It has nothing to do with whether or not officials must select the least intrusive alternative possible when screening actual visitors. Respondent concedes that when it comes to actual visitors (those who have chosen to enter the prison), prison officials may select any *reasonable* screening method.

In arguing that this Court's opinions are inconsistent in their treatment of a "less intrusive means analysis," petitioner creates a false dichotomy in the Court's cases and cites indiscriminately to cases involving both suspicionless searches and those based on some degree of suspicion, be it probable cause or articulable suspicion. This Court has consistently held that "whether a particular search meets the reasonableness standard ' "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." ' " *Vernonia School District 47J v. Acton,* — U. S. —, 115 S. Ct. 2386, 2390, 132 L. Ed. 2d 564 (1995) (quoting *Skinner v. Railway Labor Executives' Assn.*, 489 U. S . 602, 619, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989), quoting *Delaware v. Prouse,* 440 U. S. 648, 654, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979)); *Sitz,* 496 U. S. at 449-52; *Brown v. Texas,* 443 U. S. 47, 99 S. Ct. 2637, 61 L. Ed.

2d 357 (1979). In this context, the degree of the intrusion is a component of the determination of reasonableness. For example, should petitioner prevail, whether the prison officials required a pat-down or a strip search of those who would enter a prison would be irrelevant to the reasonableness analysis, an absurd situation. To say that this Court's cases are inconsistent because they say both 1) that the Fourth Amendment does not always *require* the least intrusive means available and 2) that the degree of intrusiveness is a factor to be considered in assessing reasonableness is nothing but a transparent effort by petitioner to create a conflict in this Court's cases where none, in fact, exists.

The basis for the search is also relevant to the reasonableness analysis, a point missed by petitioner. Where a search is based on probable cause, a greater level of intrusion will be permitted. Thus, where there is reason to suspect the presence of controlled dangerous substances on the person of a prison visitor, a strip search is permitted but a strip search cannot be required of all visitors. *See Spear v. Sowders,* 33 F. 3d 576, *reh. granted,* (6th Cir. 1994); *Daugherty v. Campbell,* 935 F. 2d 780 (6th Cir. 1991); *Long v. Norris,* 929 F. 2d 1111 (6th Cir. 1991); *Hunter v. Auger,* 672 F. 2d 668 (8th Cir. 1982); *Thorne v. Jones,* 765 F. 2d 1270 (5th Cir. 1985); *Blackburn v. Snow,* 771 F. 2d 556 (1st Cir. 1985); *State v. Garcia,* 116 N. M. 87, 860 P. 2d 217 (1993).

The correct standard to be applied in cases of *suspicionless* searches or seizures, the balancing of governmental need against the level of intrusion, was

applied by the Court of Appeals of Maryland in respondent's case. (A. 10a-20a.) Applying this standard, the Court of Appeals found, consistent with virtually all of the lower courts that have considered the issue, that the government simply lacked a sufficient need to conduct suspicionless detentions and scans of non-visitors and that no level of intrusion into the privacy rights of the non-visitors was thus justified.[4] *See United States v. $124,570 U. S. Currency,* 873 F. 2d 1240 (9th Cir. 1989) (airport); *United States v. Davis,* 482 F. 2d 893, 908 (9th Cir. 1973) (airport); *United States v. Kroll,* 481 F. 2d 884, 886 (8th Cir. 1973) (airport); *United States v. Henry,* 615 F. 2d 1223 (9th Cir. 1980) (airport); *United States v. Moore,* 483 F. 2d 1361 (9th Cir. 1973) (airport); *United States v. Albarado,* 495 F. 2d 799 (2d Cir. 1974) (airport); *Gaioni v. Folmar,* 460 F. Supp. 10 (M. D. Ala. 1978) (civic center); *Jordan v. Wolke,* 450 F. Supp. 213 (E. D. Wis. 1978) (prison); *Stroeber v. Commission Veteran's Auditorium,* 453 F. Supp. 926 (S. D. Iowa (1977) (auditorium); *Collier v. Miller,* 414 F. Supp. 1357 (S. D. Tex. 1976) (university pavilion); *State v. Miller,* 110 Ariz. 491, 520 P. 2d 1115 (1974) (airport); *State v. Salit,* 613 P. 2d 245, 251 (Alaska 1980) (airport); *State v. White,* 26 Ariz. App. 505, 549 P. 2d 600 (1976) (airport); *Estes v. Rowland,* 14 Cal. App. 4th 508, 17 Cal. Rptr. 2d

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[4] The intermediate appellate court of Illinois has upheld the suspicionless detention and search of those who would leave rather than submit to visitors' screening procedures. *See People v. Turnbeaugh,* 116 Ill. App. 3d 199, 451 N. E. 2d 1016 (1983). The court's reasoning was flawed by its assumption that only guilty visitors would want to leave rather than to submit, an assumption which the constitution does not permit, *Florida v. Bostick,* 501 U. S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991), and by its reliance on a case where there was reasonable articulable suspicion for a search of an airline passenger. *United States v. Skipwith,* 482 F. 2d 1272 (5th Cir. 1973).

901 (1993) (prison); *People v. Hyde,* 12 Cal. 3d 158, 524 P. 2d 830, 115 Cal. Rptr. 358 (1974) (airport); *Nakamoto v. Fasi,* 64 Hawaii 17, 635 P. 2d 946 (1981) (arena); *State v. Carter,* 267 N. W. 2d 385, 387 (Iowa 1978) (auditorium); *People v. Whisnant,* 103 Mich. App. 772, 303 N. W. 2d 887, 891 (1981) (prison); *Bozer v. Higgins,* 204 A. D. 2d 979, 613 N. Y. S. 2d 312 (1994) (court house); *State v. Chipley,* 29 Or. App. 691, 564 P. 2d 1096, 1098 (1977) (airport); *Commonwealth v. Dugger,* 506 Pa. 537, 486 A. 2d 382 (1985) (prison); *Jacobsen v. Seattle,* 98 Wash. 2d 668, 658 P. 2d 653 (1983) (arena).[5] The dissenters in the Court of Appeals of Maryland focused on the fact that wrongdoers might leave and return when the canine screening was not in place. As the majority noted, the problem of the wrongdoer would be resolved by consistent screening. (A. 19a.) Under the dissenters' reasoning, persons who turned back upon seeing the first sign announcing screening policies could be chased down and detained. That reasoning imputes improper motives to the exercise of Fourth Amendment rights and unduly burdens average law-abiding citizens (including lawyers, clergy, tradespeople, as well as family members and friends of inmates) who would rather forego a prison visit than submit to a detention for a dog scan, search, or other invasion of privacy.[6]

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[5] As the Court of Appeals of Maryland noted in this case, cases holding that a prospective passenger or visitor no longer retained a right to leave rather than submit invariably involve situations where the passenger has already submitted to magnetometer or X-ray inspection and has triggered it in some fashion. (A. 17a.)

[6] Although it is clear that a prospective visitor's refusal to consent to a detention and scan does not give the officer cause to suspect wrongdoing, that was one of the stated reasons for petitioner's detention. In *Florida v. Bostick,* this Court reiterated, "We

CONCLUSION

This Court's opinions are perfectly clear in establishing the standard to be applied in these cases. The lower courts have not been misled by them in concluding that to force a non-visitor to submit to visitors' screening procedures is unreasonable. Consequently, there is no significant conflict in the decisions of the federal circuit courts nor the highest courts of the states on this issue. It follows that this case is not an appropriate one for certiorari review.

Respectfully submitted,

Stephen E. Harris
Public Defender of Maryland

Julia Doyle Bernhardt
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have consistently held that a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." 501 U. S. at 437.

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* * * * * * * * * *

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of April, 1996, three copies of respondent's Brief in Opposition and Motion for Leave to Proceed in Forma Pauperis were hand delivered to Gary E. Bair, Esquire, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, 200 Saint Paul Street, Baltimore, Maryland, 21202, (410) 576-6422, counsel for petitioner.

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